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May 1, 1995

The Honorable John J. Cleveland
State Senator
State House Station Three
Augusta, Maine 04333

Dear Senator Cleveland:

This is in response to your letter of April 26 requesting an opinion on several questions relating to L.D. 1412, Part D. By letter of April 27, I advised you of my tentative views with respect to the constitutionality of Sections D–4 and D–5 of L.D. 1412 and advised you that a more detailed opinion would be forthcoming.

At the outset, it is helpful to outline the general structure of Part D of L.D. 1412 in its original form.[1] Although L.D. 1412 is a Supplemental Budget bill for fiscal year 1995, Part D of L.D. 1412 is intended to create a mechanism that will allow savings to be achieved during the biennial budget for fiscal years 1996 and 1997. As recited in Section D–1 of L.D. 1412, Part D is designed to implement a productivity initiative that will allow $45,346,780 in General Fund savings in the 1996–97 biennium.

Specifically, Sections D–2 and D–3 create a Productivity Realization Task Force that will consider how to achieve increased productivity and efficiency throughout state government through various measures including attrition, elimination of redundant functions, changes in management, technology, changes in agency and program missions, program restructuring, and privatization. This task force shall make recommendations to the Governor with respect to measures designed to achieve savings in the amount of the deappropriations to be specified in the 1996–97 biennial budget.

[1]We are aware of certain amendments to Part D that have been proposed since your letter of April 26. This opinion relates to L.D. 1412 in its unamended form.

The actual method of achieving the specified savings is addressed by Sections D–4 and D–5. Section D–5 authorizes the Governor, notwithstanding any other provision by law, (1) to transfer positions between General Fund accounts and departments and (2) to transfer the balances of General Fund appropriations between line categories, accounts, and departments "in order to achieve the deappropriations" that will be specified in the biennial budget for the fiscal year 1995-96 and fiscal year 1996-97.

Section D–4 provides that, if the task force recommendations would require any change in existing statutes beyond the transfers of positions and balances authorized by Section D–5, the Governor shall notify the Legislature of the nature and proposed impact of those recommendations and, if the Legislature is not already in session, call the Legislature into Special Session to consider legislation necessary to implement the recommendations. Once commenced, the Legislature would have three calendar days to enact alternative legislation achieving the same amount of projected savings without increasing revenue. If the Legislature fails to enact such alternative legislation, Section D–4 provides that the Governor may proceed to "implement" the recommendations in question to achieve the projected savings or deappropriations. Part D also contains a specific sunset clause, effective June 30, 1997.

Because of the way in which the questions you have posed are interrelated, I believe it makes most sense to consider the constitutionality of Section D–5 first and then proceed to consider the constitutionality of Section D–4 and your other questions.

1. Constitutionality of Section D–5.

The question of whether Section D–5, authorizing the Governor to transfer positions and account balances between appropriations, is an invalid delegation of legislative authority depends on whether the delegation is accompanied by adequate standards sufficient to guide the action of the executive. *See Lewis v. Department of Human Services*, 433 A.2d 743, 747 (Me. 1981). The existence of standards is necessary to assure that the authority delegated will be exercised "in accordance with basic policy determinations made by those who represent the electorate" and to assure that some safeguard exists to prevent arbitrariness in the exercise of power. *Id.* As the *Lewis* case demonstrates, the standards necessary to uphold a delegation may be "implicit" and may be derived from the context of the legislative scheme as a whole, even if not set forth in the statutory delegation of authority itself. 433 A.2d at 746–48.

In this instance, the necessary standards can be found in Section D–1, which provides that the intent of the productivity initiative is to realize cost savings "from increased productivity of state employees, more efficient delivery of services, and the elimination of waste, duplication, and unnecessary programs." This language, in the context of the overall legislative scheme contained in Part D, supplies standards to guide the exercise of the Governor's authority in Section D–5 and would appear to resolve any constitutional problem. Specifically, the Governor would be given broad *managerial* discretion to achieve savings by increasing productivity and efficiency and eliminating waste, duplication, and redundancy. However, Section D–5 would not authorize the Governor to transfer positions or balances because he disagreed with the Legislature's policy decision to create or continue a specific program. He would not be authorized to eliminate or cripple an existing governmental program based on his views as to the social utility or wisdom of the program in question. Section D–5 also would not authorize the Governor to transfer balances and positions for arbitrary reasons unrelated to efficiency and productivity.

Thus, Section D–5 gives the Governor authority to decide how to deliver the governmental services and fulfill the governmental obligations set forth in existing legislation. It contemplates that, by transferring positions and balances, the Governor may consolidate certain governmental functions and perform other governmental functions with fewer resources and personnel. The Governor is not, however, authorized to override the policy decisions of the Legislature as to whether or not to provide a specific governmental service. His actions must be designed to meet the goals of delivering existing governmental services with fewer resources through increased productivity and efficiency and the elimination of waste and duplication. The exercise of his authority is thus guided and limited by the standards of productivity and efficiency.

The standards contained in Section D–1, therefore, embody the "basic [legislative] policy determinations" necessary to guide the exercise of the authority conferred in Section D–5 and provide sufficient safeguards against arbitrary action so that we believe Section D–5 would pass constitutional muster. Moreover, the delegation of authority here would be limited to the extent necessary to achieve approximately $45 million in savings -- an amount that we understand is only 1.3 percent of the total amount of General Fund monies in the 1996–97 biennial budget. Nevertheless, Section D–5 constitutes a broad delegation of power to the Governor, and we express no opinion as to whether the Legislature should, as a matter of policy, agree to such a delegation. This opinion is directed solely to the question of whether, in our view, Section D–5 of L.D. 1412 would be found to be unconstitutional by the Supreme Judicial Court. In this connection, it bears

emphasis that our opinion on this issue is by necessity limited to an evaluation of the validity of Section D-5 on its face, while the Court's eventual view on this issue may depend in part on how the authority contained in Section D-5 is exercised.

In expressing the view that the Supreme Judicial Court would not find Section D–5 to be unconstitutional, we are also guided by the fact that during the last two decades the Law Court has consistently sustained state statutes against charges of improper delegation. *Lewis*, 433 A.2d at 746–48; *Board of Dental Examiners v. Brown*, 448 A.2d 881, 884 (Me. 1982); *Maine School Administrative District 15 v. Raynolds*, 413 A.2d 523, 529 (Me. 1980); *State v. Dube*, 409 A.2d 1102, 1104–05 (Me. 1979). This is true even when, as in the *Lewis* case, the statutory provisions involved have provided minimal guidance.[2]

You have also expressed concern as to whether, aside from the adequacy of standards, Section D–5 would violate the separation of powers because it would allow the Governor to exercise power that can only be exercised by the Legislature. The power to appropriate and deappropriate funds is a core legislative function, and we do not believe that the Legislature could validly delegate its appropriation power to the Governor. However, although the language contained in the current version of Section D–5 is somewhat unclear, it is our understanding that Section D–5 contemplates that the actual deappropriation will still be made by the Legislature via a lump sum deappropriation in the biennial budget. Under these circumstances, Section D–5 would not delegate the Legislature's appropriation power since that power will still be exercised by the Legislature. Instead, Section D–5 would be intended to give the Governor the administrative tools to transfer positions and balances as necessary to achieve the savings required by the Legislature's lump sum deappropriation.

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[2]In general, courts have not shown any recent enthusiasm for the delegation doctrine. At the federal level, the doctrine has for some time been regarded as a dead letter. Davis, *Administrative Law Treatise*, § 3.1 (2d ed. 1979). At the municipal level, the Law Court has invalidated two ordinances on delegation grounds in recent years. *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987); *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983). Those cases, however, evidence the fact that the delegation doctrine has been applied more strictly to municipalities than to the State. More fundamentally, the two cases in question are also best understood as involving a failure to provide adequate standards to guide quasi–judicial activity by executive officers. The Law Court has not appeared to have been troubled if the executive officers themselves provided the requisite standards (through rulemaking) so long as the standards existed when it came time to determine the rights of individuals and entities in quasi–judicial proceedings. *See Secure Environments, Inc. v. Town of Norridgewock*, 544 A.2d 319, 323 (Me. 1988).

Although the Legislature has traditionally exercised its appropriation power by breaking down its appropriations into specific categories, we are not aware of any reason why the Legislature could not, if it chose to do so, exercise its appropriation power by appropriating a single lump sum to the executive branch -- thus leaving it up to the Governor to determine how to allocate that money in order to meet the various statutory responsibilities of the State and its agencies. That being so, we believe that the Legislature may also deappropriate by lump sum and simultaneously give the Governor the authority to transfer funds and positions as required to operate the government in light of the reduced money available.

In our view, this is exactly what Section D–5 is intended to accomplish. As a result, it does not involve a situation where the Governor would be authorized to exercise a power exclusively belonging to another branch of government in violation of Article III, Sections 1 and 2 of the Maine Constitution. Those provisions expressly provide that the powers of the State government shall be divided into three distinct departments (legislative, executive, and judicial) and that no person belonging to one of these branches shall exercise the powers properly belonging to another branch. *See State v. Hunter*, 447 A.2d 797, 799–800 (Me. 1982). In this instance, it appears that the gubernatorial action contemplated by Section D–5 involves the kind of managerial actions that are quintessentially executive in nature -- increasing productivity and efficiency, eliminating waste and duplication, allocating funds and employees as operationally required to provide those governmental services mandated by the Legislature and meet those governmental obligations established by the Legislature. *See* Me.Const., Art. I, Part I, § 1 (supreme executive power shall be vested in the Governor). This would not improperly invade the Legislature's exclusive authority. In this connection, it is our understanding that the major savings to be achieved under Section D–5 will be derived from the Governor's existing authority to leave vacancies unfilled and, in some instances, to lay–off employees. Thus, Section D–5 can be seen as giving the Governor the additional managerial tools required to operate state government in light of the Legislature's exercise of its appropriation power through a lump sum deappropriation.

Under these circumstances, it would appear that Section D–5 of L.D. 1412 is not inconsistent with the separation of powers set forth in the Maine Constitution. It contemplates that the Legislature will continue to exercise the ultimate deappropriation power but authorizes the executive branch to respond to that deappropriation by taking the necessary managerial steps in order to continue to provide government services with reduced resources by implementing measures to increase productivity and efficiency.

2. Constitutionality of Section D–4.

You have separately asked whether Section D–4 of L.D. 1412 constitutes a violation of the separation of powers or violates the enactment and presentment provisions of Article IV, Part 3, Section 2. Under L.D. 1412, Section D–4 comes into play if the Governor's Productivity Realization Task Force recommends action that would involve changes in an existing statute. The Governor's authority under Section D–5 of L.D. 1412 to achieve savings by transferring balances and positions, as discussed above, does not require invocation of the procedure set forth in Section D–4.

Section D–4 in its current form contemplates that the Governor could propose changes to existing statutes that he could implement -- until June 30, 1997 -- if the Legislature failed to act within three days at a special session. In effect, therefore, this would give the Governor the power to amend existing law until June 30, 1997 without further legislative action. In our view, as we have previously advised you, this would be a violation of the separation of powers required by the Maine Constitution and would be inconsistent with the enactment and presentment provisions of Article IV, Part 3, Section 2.

In *State v. Hunter*, 447 A.2d at 799–800, the Law Court noted that because of the express separation of powers clause contained in Article III, Section 2, the separation of powers mandated by the Maine Constitution is more vigorous than that required of the federal government by the United States Constitution. *Hunter* sets forth the relevant inquiry under the Maine Constitution as follows:

> Has the power in issue been explicitly granted to one branch of state government and to no other branch? If so, Article III, Section 2 forbids another branch to exercise that power.

447 A.2d at 800. As discussed above, Article III, Section 2 of the Maine Constitution does not forbid the Legislature from delegating specified authority to the executive branch so long as that delegation is accompanied by appropriate standards. However, Section D–4 of L.D. 1412 -- by permitting the Governor to "implement" proposed amendments to state statutes even if the Legislature fails to enact those amendments -- can only be seen as a delegation of the actual power to make laws. That power is reserved to the Legislature. *See* Article IV, Part 3, Section 1.

Moreover, under Article IV, Part 3, Section 2, proposed legislative changes can only be implemented if they are passed by both branches of the Legislature,

presented to the Governor for his approval, and approved by the Governor (or if vetoed by the Governor, passed by two–thirds majorities in both houses). *See Opinion of the Justices*, 96 A.2d 749, 751 (Me. 1953). The infirmity of Section D–4 is that it provides that amendments proposed to the Legislature may be given the force of law until June 30, 1997 even though they have not been passed by a majority of both houses of the Legislature if the Legislature simply fails to act within a three day period.

3. Binding Effect of L.D. 1412 if Enacted.

You have also asked whether the Legislature would be free, at the Second Regular Session or at a Special Session, to repeal or amend the provisions of L.D. 1412.

We think there is no doubt that L.D. 1412, if enacted, would be subject to repeal or amendment at any time. This means that the Legislature could repeal or amend all or any part of L.D. 1412 by majority vote if the Governor approved such action or by a two–thirds vote of each house in the event of a gubernatorial veto.

4. Effective Date of Legislation.

Finally, you have asked about the effective dates of the Governor's proposed changes and of any legislation that might be passed by the Legislature at a Special Session or at the Second Regular Session, as contemplated by Section D–4. Since we do not believe that the separation of powers would permit any proposed amendments to take effect without legislative action, for the reasons discussed above, we need only consider the effective dates of any legislative action that might occur at a Special Session or at the Second Regular Session. If the Legislature were to enact legislation of the kind contemplated by Section D–4 at a Special Session or at the Second Regular Session, we believe such legislation would be subject to the provisions of Article IV, Part 3, Section 16, and would not take effect for 90 days after the session, unless enacted as an emergency by a two–thirds vote as provided in Article IV, Part 3, Section 16.

I hope this responds to your inquiries. Please feel free to seek further clarification if necessary.

Sincerely,

Andrew Ketterer

ANDREW KETTERER
Attorney General

AK/rar
cc: Honorable Angus S. King, Jr.
Honorable Daniel Gwadowsky
Honorable Jeffrey Butland